GMAC
Commercial Mortgage
Affordable Housing Division

March 4, 2005

California State Board of Equalization
Property and Special Taxes Department
450 N Street
P.O. Box 942879
Sacramento, California 94279
Attn: Mrs. Ladeena Ford

Re: Comments to Proposed Welfare Exemption Rules

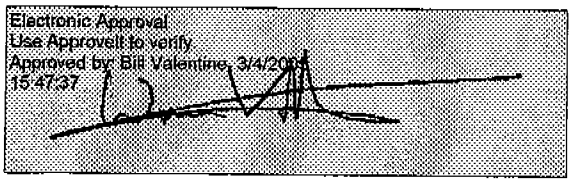
Ladies & Gentlemen:

I am writing to voice my support for the Board of Equalization's present system for administering the property tax exemption under California Revenue and Taxation Code, Section 214(g) for partnerships in which a nonprofit corporation serves as the managing general partner.

I began financing affordable housing development in the State of California in 1996, and have worked with 27 separate development companies between 1996 and today. Some of these companies have been qualified non profits; some have been for profit developers. All have developed good projects. Without the welfare exemption, virtually all of these projects would have had a shortfall in permanent loan amount. I consider the welfare exemption to be vital to the development of affordable housing in California. Over the years, the BOE has successfully developed a system for reliably and efficiently administering the welfare exemption. There is nothing wrong with the present system. If anything, California needs to make it easier to finance and develop affordable housing, not harder.

I oppose the self-interested efforts of those industry critics who are urging the BOE to make the welfare exemption more difficult to administer and less predictable to project. I strongly urge the BOE to carefully consider the potential effect of changing the present rules.
I am enclosing for your review Cox, Castle and Nicholson LLP's policy paper on the proposed welfare exemption rules. I endorse CCN's reasoning and conclusions.

Sincerely,
GMACCM Affordable Housing Division



William Valentine
Vice President

COX CASTLE NICHOLSON

POLICY PAPER:
CALIFORNIA STATE BOARD OF EQUALIZATION
PROPOSED WELFARE EXEMPTION RULES
March 4, 2005

This policy paper addresses a major affordable housing issue identified in the California State Board of Equalization's (the "BOE's") January 14, 2005 letter concerning proposed new "welfare exemption" rules. Issue #7 identified in the BOE's January 14 letter relates to what authorities and duties should be required of a qualifying "managing general partner" under California Revenue and Taxation Code ("R&T") Section 214(g)(1). This paper addresses the managing general partner concept and, at a more general level, discusses the BOE's current regime for administering R&T Section 214(g) ("Section 214(g)").

Specifically, this paper:

- Describes how affordable housing developments are financed today in California.
- Reviews the history and purpose of 214(g).
- Analyzes some of the more radical suggestions for change and points out the dangers of such radical reform.
- Concludes that the current BOE-administered system is achieving the California legislature's goal of increasing the state's affordable housing stock and supports the BOE's current administrative regime for managing the 214(g) welfare exemption.

EXECUTIVE SUMMARY

The BOE has developed a sound administrative process for implementing the welfare exemption granted under 214(g) to partnerships in which a nonprofit corporation serves as the managing general partner. The BOE's self-certification system – whereby a managing general partner of a project-owning partnership must certify, under penalty of perjury, that it has certain enumerated, substantial management authority and duties befitting a "managing" general partner – is true to the text of, and the legislative intent behind, 214(g). It strikes the proper balance between encouraging development of affordable housing in California, on the one hand, and regulating the use of the welfare exemption, on the other hand.

Contrary to the suggestions of certain critics of the BOE's compliance regime, there is no evidence that for-profit developers regularly manipulate nonprofits to abuse the welfare exemption. Even if there was an indication of individual instances of such abuse, the BOE and the county assessors (who jointly administer the welfare exemption system) already have the authority to audit suspected offenders and deny or revoke welfare exemptions.

The welfare exemption is a vital element in sustaining the financial viability of virtually every affordable housing development in California. The financial institutions that provide the vast majority of the equity and debt financing for these projects are willing to size their investments based on the expectation that a properly structured and managed project will qualify for a welfare exemption. These financial institutions now rely on the BOE system and appreciate the fact that it is predictably, consistently and efficiently managed by the BOE staff. The BOE should carefully consider any proposal for reforming the present system. Any change to the present system risks creating uncertainty in the financial community, which may result in a direct loss of affordable housing.

ANALYSIS

How Privately-Owned Affordable Housing Developments are Financed Today; How Lenders and Investors Police Welfare Exemption Compliance

(1) Overview of the System

California has a housing crisis. The evidence for this crisis is compelling and overwhelming. As the California Department of Housing and Community Development ("HCD") reported in its May, 2000 study entitled "Raising the Roof: California Housing Development Projections and Constraints, 1997 – 2020":

> "California will need an unprecedented amount of new housing construction—more than 200,000 units per year through 2020—if it is to accommodate projected population and household growth and still be reasonably affordable. It will need more suburban housing, more infill housing, more ownership housing, more rental housing, more affordable housing, more senior housing, and more family housing."

This paper focuses on the manner in which developers (for profit and nonprofit), lenders and investors have responded to the affordable housing portion of the California housing crisis. While there are larger social factors that have contributed to the affordable housing crisis, much of it is attributable to market factors that make it extremely difficult for affordable housing developers to compete with market rate developers for suitable multi-residential properties. In response, affordable housing development has become increasingly reliant upon a complex financial structure that leverages tax exempt bond financing, publicly subsidized financing, low income housing tax credits, and the welfare exemption.

A unique attribute of affordable housing finance is the involvement of large financial institutions in all aspects of affordable housing development. Some of the nation's largest and most reputable financial institutions are actively involved as lenders and/or equity investors in affordable housing in California. The participation by these institutions offers unique assurances that affordable housing programs, including the welfare exemption, are properly monitored and utilized. At the same time, these financial institutions require predictability and efficiency as to the availability of housing incentives such as the welfare exemption, if they are to underwrite such programs into the financing structure.

In practice, the welfare exemption is absolutely essential in maintaining affordability. The welfare exemption decreases the expenses associated with the ownership and operation of an affordable housing development, and therefore increases the size of the loans that lenders are willing to offer to project owners. Indeed, it is difficult for lenders to underwrite their loans for affordable housing projects without the property tax exemption. The Senate Revenue & Taxation Committee, in its July 15, 1987 hearing to consider the bill that was later codified as Section 214(g), recognized this financial reality, acknowledging that "some prospective low income projects may not 'pencil out' without the property tax exemption" (emphasis added).

(2) Tax Credits

In order to take full advantage of the low income housing tax credit authorized by Internal Revenue Code Section 42, the overwhelming majority of for-profit and non-profit developers in California utilize a limited partnership structure to own and operate affordable housing developments. A well-established, institutional tax credit investor (often a Fortune 500 company) or a syndicated fund of such investors make an equity investment in the limited partnership in exchange for virtually all the low income housing tax credits generated by a project. The tax credit investor utilizes the tax credits to offset federal taxes on a dollar-for-dollar basis over a 10-year period, and, therefore, is willing to make capital contributions to the project-owning partnership for these credits.

(3) Tax-Exempt Bond Financing

An affordable housing project developer often uses debt financed the issuance of low-interest, tax-exempt bonds, usually in addition to tax credits. Typically, a California state or local governmental entity issues private-activity multifamily housing revenue bonds under the state's bond volume cap, and loans the proceeds of those bonds to the project-owning partnership, receiving a deed of trust on the property as security. Tax-exempt multifamily housing revenue bonds are either publicly-offered or privately-placed.

Where such bonds are publicly-offered, investors with no firsthand knowledge of the project or the project-owning partnership purchase the bonds. Such distribution is handled by an investment banking firm with mandated obligations to utilize due diligence in any distribution of securities. Such investment bankers focus on the ability of the affordable housing project to service the repayment obligations on the bonds. Thus, these investment bankers are uniquely

focused on the underwriting standards for expenses, including the availability of the welfare exemption.

At the same time, in order to keep the interest rate on such bonds low, a credit-enhancer (typically a major national bank or financial institution) offers a letter of credit or other form of guaranty that the bonds will be repaid, even if the affordable housing project underperforms expectations and the project-owning partnership fails to repay the loaned bond proceeds. The credit enhancer thus plays the role of the real estate lender, taking all of the real estate-related risk, and conducting due diligence (including review of the availability of the welfare exemption) similar to the investment bankers' review.

Where such bonds are privately-placed, a well-established lender (typically a major national commercial bank or national financial institution) will purchase all of the bonds and loan the proceeds directly to the project-owning partnership. These lenders conduct extensive underwriting due diligence, including review of the availability of the welfare exemption.

(4) Conventional Financing and/or Loans from Governmental Agencies

Some developers choose not to obtain tax-exempt bond loans, and instead utilize conventional real estate loans (typically from a major national or regional bank) or loans from federal, state or local agencies. Sometimes a developer will obtain both a conventional loan and one or more loans from government agencies. These loans go through the same underwriting (including review of welfare exemption availability) and due diligence scrutiny as discussed above for tax-exempt bond loans.

(5) Conclusion: How Lenders and Investors Police the Property Tax Exemption

As discussed above, the tax credit equity investors, tax-exempt bond credit enhancers/lenders and conventional lenders that provide the lion's share of affordable housing project financing are some of the largest and most sophisticated financial institutions in the world. These investors and lenders subject affordable housing projects to intense underwriting scrutiny at the outset, and intense compliance oversight on an ongoing basis.

Without a predictable welfare exemption, obtainable in a timely manner, lenders would not include welfare exemption savings into their underwriting, making affordable housing projects next to impossible to finance. Moreover, in order to ensure that project-owning partnerships can afford to cover the debt service on loans underwritten to include welfare exemption savings, these lenders provide ongoing welfare exemption compliance oversight, thus providing a backstop to the BOE's and assessors' roles in policing against welfare exemption fraud.

Moreover, the BOE's managing general partner regime requires tax credit equity investors to cede a certain amount of power to nonprofits. These Fortune 500 financial institutions require strict statutory compliance by their partners (including the managing general partner), as a necessary element in protecting their equity investments in affordable housing projects. Contrary to the insinuations of the current regime's critics, these institutional tax credit

investors would not enter into a written agreement granting substantial management powers to a nonprofit, and then blithely ignore that agreement in practice.

History and Purpose of R&T 214(g)

Section 214 was enacted in 1945 to implement Section 4(b) of Article XII of the California Constitution, which provides that the California legislature may exempt from taxation "property used exclusively for religious, hospital or charitable purposes and owned or held in trust by corporations or other entities." The original policy rationale for enacting Section 214's "welfare exemption" was to treat certain privately owned property, which was used to provide a charitable activity, in the same manner as publicly owned property which would otherwise be used by government to perform that same charitable function.

(1) Managing General Partner

(a) General Discussion.

In furtherance of the spirit of the exemption, Section 214 was amended in 1987 to add subsection (g), which provides that:

> "[p]roperty used exclusively for rental housing and related facilities and owned and operated by religious, hospital, scientific, or charitable funds, foundations, or corporations, *including limited partnerships in which the managing general partner is an eligible nonprofit corporation* . . ."

shall be entitled to a full or partial property tax exemption, subject to the conditions set forth in Section 214(g) (emphasis added).

The participation of an eligible nonprofit corporation, either as the owner of the property or as the managing general partner of a limited partnership that owns the property, is constitutionally necessary. Without the participation of a nonprofit corporation, the welfare exemption granted by Section 214(g) would not comply with the tax exemption requirement set forth in California Constitution Section 4(b) of Article XII of the California Constitution.

In adopting 214(g), the California Legislature did not focus its attention on the attributes of a "managing general partner." Indeed, the highlighted language quoted two paragraphs above was inserted into the proposed text of Section 214(g) a mere twenty-one days before Governor George Deukmejian signed it into law.

The legislative history shows no debate accompanying the addition of the managing general partner concept. Rather, the legislative history reveals a debate focused almost exclusively on the benefit of increasing California's stock of affordable housing, on the one hand, versus the cost associated with the loss of property tax revenues, on the other hand. The addition of the managing general partner concept into 214(g) appears to have been an

extension of the economic reasoning behind the bill, summarized succinctly by the Senate Revenue & Taxation Committee in its July 15, 1987 hearing on 214(g):

> "The justification for the exemption would be that the funds which are currently paid in property taxes could better be used in furtherance of the goals of providing low income housing. Also, it may be that some prospective low income projects may not 'pencil out' without the property tax exemption."

(b) What is a "Managing" General Partner?

Notably, the legislature chose the phrase "managing general partner" rather than "general partner." The California Revised Limited Partnership Act contains extensive provisions setting forth the obligations of a "general partner," but makes no mention of a "managing" general partner. By choosing to use the term "managing" general partner, the legislature clearly indicated its understanding that property-owning partnerships could have other, for-profit general partners, so long as the nonprofit general partner was the "managing" general partner.

Certain affordable housing developers have suggested to the BOE that "managing general partners" should be required to provide an expanded array of operational assistance at low income housing projects. These developers have further indicated that this assistance can only be provide by nonprofit organization who are well-capitalized and have extensive staffs. If this recommendation were to be implemented, it would limit the number of qualified organizations to a very few developers and clearly undercut the intent of 214(g).

This suggestion also denigrates the many well-established and well-qualified nonprofits who are small organizations but have demonstrated the capability to develop and operate from one to a multiplicity of affordable housing projects. These organizations have accomplished this by hiring a few staff and retaining experienced property management companies and consultants. If the BOE were to impose a "litmus test" that defined a "managing general partner" according to an organization's balance sheet and/or staffing level, it would seriously undercut, if not destroy, the ability of these nonprofits to contribute to the development of affordable housing in California.

The legislative history also demonstrates a governmental sensitivity to the need to support continued participation by underfunded nonprofit organizations in affordable housing development, and a recognition that the welfare exemption would provide that support. In its Enrolled Bill Report, submitted in late September, 1987, the HCD recognized that nonprofit organizations suffer from "limited budgetary conditions." The HCD report goes on to state that the final proposed text of 214(g)would address "the Governor['s] expressed interest in . . . preserving affordable housing and assuring a continued role for nonprofits in affordable housing."

Nonprofit participation in affordable housing is as important today as it was in 1987, and therefore the BOE should resist pressure from an exclusive group of nonprofits calling

for rule changes that would increase the expense of nonprofit participation in affordable housing projects.

(2) Use of Property Tax Savings

Under Section 214(g), the owner of the property must:

> "[c]ertify that the funds that would have been necessary to pay property taxes are used to maintain the affordability of, or reduce rents otherwise necessary for, the units occupied by lower income households."

On August 18, 1987, the State Assembly amended the bill that was later codified as Section 214(g) to provide that property owners should only be required to *certify*, rather than affirmatively *demonstrate*, that the property tax savings are actually helping to maintain affordability or reduce rents. In its August 26, 1987 bill analysis, the BOE emphasized the expense of administering a requirement that a property owner affirmatively demonstrate compliance, and explained that "[i]t is not clear how the owner of the property could demonstrate that this requirement is satisfied."

By adopting a "certification" standard rather than the earlier-proposed "demonstration" standard, the Legislature moved away from requiring property owners to file financial information. Such a system would have imposed a nearly impossible burden on owners to track – perhaps on a dollar-for-dollar basis – how property tax savings are applied.

Moreover, 214(g) allows owners to certify that the property tax savings are used to maintain affordability *or* reduce rents. This standard, together with the self-certification regime, evidences the Legislature's desire to steer clear of managing exactly how affordable housing projects are run and exactly how property tax savings are applied. Instead, the Legislature focused on the broader goal of providing financial assistance for purposes of maintaining and increasing California's stock of affordable rental housing.

In practice, the welfare exemption is absolutely essential in maintaining affordability. As discussed above, the welfare exemption decreases the expenses associated with the ownership and operation of an affordable housing development, and therefore increases the size of the loans that lenders are willing to offer to project owners. Indeed, it is difficult for lenders to underwrite construction and permanent loans for affordable housing projects without the property tax exemption.

Radical Reforms Are Ill-Advised

Since the BOE's reform proposal was announced in January, 2005, a very small but vocal element has suggested that there is systemic and widespread abuse of the welfare exemption. While this is a dramatic proposition, there is simply no evidence whatsoever of such abuse. Indeed the only "evidence" to date consists of anecdotal, third-hand statements by a few

members of the public regarding singular examples of perceived abuse. While the BOE should certainly take accusations of fraud seriously, it would be rash to suggest that a few such allegations warrant wholesale changes to the present system.

Another theme running through some of the vocal criticism of the present system is the implicit suggestion that some nonprofits are less worthy than others. This criticism is essentially a "straw man" argument. It diverts attention from the real public policy issue at hand, namely meeting the legislature's mandate for the production of more affordable housing, and tries to focus attention on the perceived qualities of certain nonprofits. This is an entirely subjective and relative matter. There is no litmus test for what is a nonprofit, nor should one be imposed. Moreover, such a consideration is outside of the mission of the BOE and would unnecessarily burden the BOE's already overused resources. The Internal Revenue Service ("IRS") and California's Franchise Tax Board ("FTB") are the appropriate authorities for such determinations, and these agencies already vet prospective nonprofits at the outset, before such entities can even consider becoming involved in the welfare exemption process. Indeed, the BOE's proposed Rule 140 requirements regarding BOE review of a nonprofit's "charitable" purposes, as presented at the BOE public meeting on March 2, 2005, are wholly duplicative of IRS and FTB responsibilities and, therefore, are unnecessary.

A final suggestion proffered by a few critics is that only nonprofits involved in the physical operation of an affordable housing project merit the welfare exemption. Presumably, only nonprofits with their own management companies or construction companies could ever meet a stringent application of this test. That proposed standard is entirely inappropriate. The welfare exemption has never been construed to require such ground level involvement, as discussed in the legislative history section above. Rather, essential management and oversight, as required by the BOE's present system, is the critical test. Requiring a nonprofit to have extensive assets and capital is antithetical to the legislative history, which noted that nonprofits suffer from "limited budgetary conditions."

The Current BOE-Administered System is Achieving the Goals of 214(g)

The current BOE-administered system for assuring compliance with 214(g), as set forth in the BOE's Assessor's Handbook Section *Welfare, Church and Religious Exemptions*, is achieving the original purpose of 214(g): namely, to increase California's stock of affordable rental housing. The BOE's proposed Rule 140, as presented at the March 2 public meeting, would amend the present system by adding additional requirements that are, at heart, substantially similar to the present requirements. The BOE should carefully consider the cost associated with making changes to the present system. Unless change is urgently needed (and this paper has argued that it is not needed), and unless the proposed changes would fundamentally reform the present system (and this paper has argued that the changes proposed by Rule 140 do not), then the BOE should carefully consider the administrative cost of tinkering with a system that already predictably and efficiently achieves the legislature's goals.

With respect to "managing general partner" duties, the BOE's self-certification standard – whereby a managing general partner of a project-owning partnership must certify, under

penalty of perjury, that it has certain enumerated management authority and the substantial duties befitting a "managing general partner" – is in keeping with the legislative intent behind 214(g). As discussed above, the legislature consciously chose to adopt a "*certification*" system rather than a "*demonstration*" system for assuring compliance with 214(g)'s requirement that property tax savings be applied towards reducing rents or maintaining affordability. The BOE's managing general partner self-certification standard stays true to the original legislative intent behind 214(g): increasing California's affordable housing stock, rather than imposing governmental control over exactly how affordable housing projects are run.

Further, since 214(g) does not discuss a managing general partner's duties or attributes, there is no clear legislative authorization for the BOE to expand the reasonable list of duties that managing general partners are required presently to attest to on forms BOE 267-L1 and BOE 277-L1. Indeed, the suggestion from a few critics of the current self-certification regime that it allows "nonprofit shells" to obtain property tax exemptions on behalf of for-profit developers is not only factually incorrect – it also runs counter to the very purpose of 214(g).

However, should either the BOE or a county assessor suspect that a particular managing general partner is failing to exercise the managerial control that it is certifying to on forms BOE 267-L1 or BOE 277-L1, both the BOE and the county assessor have the right to audit the potentially offending parties. Forms BOE 267-L1 and BOE 277 L-1 both clearly alert a filing non-profit of this fact, stating in bold letters: "**Welfare Exemption claims and supporting documents are subject to audit by the Board of Equalization and by the Assessor.**" Therefore, in response to any suggestion from critics that some fraudulent managing general partners are abusing the welfare exemption system, the BOE and the county assessors can and should emphasize that they have the power to audit any and all limited partnerships that obtain a welfare exemption, and the power to revoke improperly obtained welfare exemptions.

Also, from an economic efficiency standpoint, if the property tax exemption is to be accounted for in a lender's initial underwriting, it must be knowable, predictable, and timely obtained. In an era where tax credit investors, credit enhancers and conventional lenders make long-term financial commitments to each affordable housing project that they finance, the predictability of the BOE's bright-line certification process provides a necessary source of predictability. Without that predictability, financial institutions would not count on the availability of property tax savings, and would reduce the amount of money that they would be willing to lend and/or invest in affordable housing projects. Any decrease in available financing would only worsen the ability of developers to try to meet California ever-increasing need for affordable rental housing.

The BOE's certification system (supported by the BOE's and the county assessors' audit rights), when coupled with the strict, ongoing oversight provided by tax credit investors, credit enhancers and conventional lenders, assures that managing general partners will continue to wield essential management authority, rather than operating as a "nonprofit shell" for the purposes of obtaining the property tax exemption.

Lastly, the authors of this policy paper would like to support the BOE staff's positions outlined in the BOE's February 24 follow-up letter signed by Dean R. Kinnee. The authors of

this paper support the BOE's ongoing efforts to add predictability to all remaining unsettled areas of 214(g) administration and practice.

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GMAC
Commercial Mortgage
Affordable Housing Division

March 4, 2005

Steven Fayne
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Sacramento, California 94279
Attn: Mrs. Ladeena Ford

Re: Comments to Proposed Welfare Exemption Rules

Dear Madam/Sir:

Our firm has lent in excess of a billion dollars on California low income housing properties supported by the property tax exemption. But for that exemption the loans would not be possible. Additionally, our sister company Paramount Financial Group has made hundreds of millions of equity investments in California low income multifamily housing projects which would not be possible without the exemption.

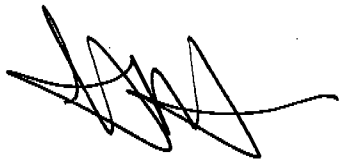
We write to voice our support for the Board of Equalization's present system for administering the property tax exemption under California Revenue and Taxation Code, Section 214(g) for partnerships in which a nonprofit corporation serves as the managing general partner.

The welfare exemption is critical to the development of affordable housing in California. Over the years, the BOE has successfully developed a system for reliably and efficiently administering the welfare exemption. The present system is working. If anything, California needs to make it easier to finance and develop affordable housing, not harder.

We oppose the self-interested efforts of those industry critics who are urging the BOE to make the welfare exemption more difficult to administer and less predictable to project. We strongly urge the BOE to carefully consider the potential effect of changing the present rules.

We enclose for your review Cox, Castle and Nicholson LLP's policy paper on the proposed welfare exemption rules. We strongly endorse CCN's reasoning and conclusions.

Sincerely,
GMACCM Affordable Housing Division



Steven N. Fayne
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cc: Steve Westly, California State Controller
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1300 Clay Street, Ninth Floor
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March 4, 2005

memorandum

To

Ladeena Ford, State Board of Equalization

From

M David Kroot, Robert C. Mills, Amy DeVaudreuil

RE

Additional Comments on Proposed Property Tax Rules 140-143

I. Introduction

The letter to interested parties dated February 24, 2005 from the State Board of Equalization (the "BOE") indicated that BOE staff is still researching "the issue whether projects without either tax credits or government financing, but with 'project-based' Section 8 funding may satisfy the government financing criteria in Section 214, subd. (g)(1)(A)." The BOE indicated that staff may recommend that such projects are eligible for exemption "*if* the properties remain subject to a regulatory agreement that restricts all or a portion of the property for rental to lower-income households." Our comments in this Memorandum address issues raised by the language above. This Memorandum supplements the comments submitted by Goldfarb & Lipman dated October 15, 2004.

II. Project-Based Section 8 Is "Government Financing"

The first issue raised by the BOE is whether project-based Section 8 constitutes "government financing" under Section 214(g)(1)(A). Section 214(g)(1)(A) requires that a project eligible for exemption receive "government financing." In a project-based Section 8 development, the property owner receives rent subsidy funds from HUD or a HUD-funded local housing authority for a specified number of tenants throughout the term of the contract. Under the plain language of the statute, then, project-based Section 8 funding should qualify as "government financing."

III. A Project-Based Section 8 Contract Satisfies the "Enforceable and Verifiable Agreement with a Public Agency" Requirement

The second issue implicitly raised by the BOE is whether the project-based Section 8 contract suffices as "a regulatory agreement that restricts all or a portion of the property

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for rental to lower-income households." We have noticed that the term "regulatory agreement" has been used in different ways throughout the recent process of proposing clarification to the welfare exemption law. This is a term that should be clarified in the new Property Tax Rules.

Section 214(g)(2)(A)(i) provides that a project must have "an enforceable and verifiable agreement with a public agency, a recorded deed restriction, or [in the case of a nonprofit organization] other legal document" that restricts the rent and occupancy of the project for the project to qualify for the welfare exemption. When the welfare exemption for lower income housing was first enacted, the statute listed as eligible restricting documents, "deed restriction, agreement, or other legal document." When the statute was amended in 1999, the legislature changed "agreement" to "enforceable and verifiable agreement with a public agency" and changed "deed restriction" to "recorded deed restriction." From these specific changes, it is clear that the legislature intended that the only document required to be recorded was a deed restriction. If the legislature had intended to require agreements with public agencies to be recorded, it would have indicated as such. An agreement with a public agency has only to be enforceable and verifiable. This means that the agreement has to be a valid binding legal contract, not that recordation is required. The term "regulatory agreement" is typically used to refer to a recorded agreement with a government agency. Using the term "regulatory agreement" in this context might imply that an agreement with a public agency must to be recorded to qualify a project for the welfare exemption, which is not the statutory requirement. We suggest that the BOE clarify that an agreement with a public agency restricting occupancy and rent need not be recorded to satisfy Section 214(g)(2)(A)(i).

A project-based Section 8 contract with either HUD or the local housing authority is clearly an "enforceable and verifiable agreement with a public agency." It is a legal contract that is valid and binding and places occupancy and rent restriction on the project. As such, a project-based Section 8 contract should satisfy the requirements of Section 214(g)(2)(A)(i).

:ad

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Memorandum

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October 15, 2004

To

Ladeena Ford
State Board of Equalization

From

M David Kroot, Dianne Jackson McLean, and Amy DeVaudreuil

RE

Comments on Proposed New Welfare Exemption Property Tax Rules 140-143

I. Introduction

We understand that the Board of Equalization (the "BOE") has decided to pursue the adoption of new property tax rules relating to the welfare exemption. This project, as we understand, replaces the BOE's proposed changes to Chapter 5 of the Assessors' Handbook Section 267, *Welfare, Church, and Religious Exemptions*. In Letter to Assessors No. 2004/052, you requested comments on the subject areas and statutory provisions to be addressed in the proposed new property tax rules. We assume that the proposed property tax rules will address many of the issues raised by the BOE's earlier proposed updates to the Assessors' Handbook. We have structured our comments to highlight the issues raised by each of the proposed property tax rules, as informed by the BOE's prior efforts.

II. Proposed Rule 140: *Managing General Partner as a Qualifying Organization for the Welfare Exemption*

We support the effort to clarify the management authority and duties required of a nonprofit managing general partner in order for housing owned by a limited partnership to qualify for the welfare exemption. To maintain the appropriate balance of approval rights and control, the nonprofit managing general partner should be responsible for the essential day-to-day operations of the limited partnership and should be the entity actually implementing the responsibilities, not the limited partner. In addition, the proposed property tax rules should address the situation where a profit-motivated general partner not related to the investor limited partner exercises

significant day-to-day control, either directly or by assignment from the managing general partner, which is definitely a concern.

III. Proposed Rule 141: *Welfare Exemption Requirements for the Lower Income Housing Properties of Limited Partnerships with a Nonprofit Organization as Managing General Partner*

We support the proposal to clarify the requirements for limited partnerships to qualify for the welfare exemption. The supplemental affidavits required for limited partnership (BOE-267-L1) and nonprofit managing general partners (BOE-277-L1) would streamline the exemption process as long as they include a mechanism for ensuring that the limited partnership does not amend its partnership agreement to remove the control from the nonprofit managing general partner, or in some other way violate an essential component of the welfare exemption requirements.

IV. Proposed Rule 142: *Welfare Exemption Requirements for Low Income Housing Properties*

Clarifying the terms of Section 214(g) would help standardize the implementation of the welfare exemption across counties. We do, however, have some concerns related to the use of certain terms in the BOE's proposed updates to the Assessors' Handbook. Our comments below address the issues raised by the proposed updates to the Assessors' Handbook.

A. Regulatory Agreements

In contrast to the implications of the BOE's proposed updates to the Assessors' Handbook, a regulatory agreement need not be recorded in order to comply with Section 214(g). Section 214(g)(2)(A)(i) provides that a project must have "an enforceable and verifiable agreement with a public agency, a recorded deed restriction, or [in the case of a nonprofit organization] other legal document" that restricts the rent and occupancy of the project for the project to qualify for the welfare exemption. When the welfare exemption for lower income housing was first enacted, the statute listed as eligible restricting documents, "deed restriction, agreement, or other legal document." When the statute was amended in 1999, the legislature changed "agreement" to "enforceable and verifiable agreement with a public agency" and changed "deed restriction" to "recorded deed restriction." From these specific changes, it is clear that the legislature intended that the only document required to be recorded was a deed restriction. If the legislature had intended to require agreements with public agencies to be recorded, it would have indicated as such. A regulatory agreement with a public agency has only to be enforceable and verifiable. This means that the agreement has to be a valid binding legal contract, not that recordation is required.

To be clear, the law does not set a minimum term for the length of a regulatory agreement, as suggested by the proposed updates. The determinative fact for exemption qualification is whether, in a given year that an organization is claiming the welfare exemption, the organization is in that year subject to an enforceable and verifiable agreement with a public agency (or recorded deed restriction or other legal document, if applicable). Public agencies many times require regulatory agreements with terms longer than the term of the subsidy payments. For example, redevelopment law requires a 55-year regulatory term for new or substantially rehabilitated multifamily housing developed with low and moderate income housing funds, even if a one-time assistance payment is made in the first year.

B. Government Financing

We are also concerned by the implication in the proposed updates to the Assessors' Handbook that, once government financing has been repaid, a project no longer qualifies for the welfare exemption. It is our position that if a low-income housing development has received government financing at some point in time (acquisition, pre-development, construction, etc.) and it remains subject to a regulatory agreement that restricts its occupancy and rents in the year in which it is claiming an exemption, then it should qualify for the exemption. The reason that government entities provide financing for affordable housing at all is to ensure that the housing remains affordable for a substantial period of time. The purpose of executing a regulatory agreement separate from a loan agreement is specifically to retain affordability, in some instances, for a term longer than the length of the loan term. It is a material consideration in approving the loan. Many government regulatory agreements further provide that even if the underlying financing is paid off, the regulatory agreement remains in effect for its full term. A project need only to have received government financing where part of the original consideration was a regulatory agreement restricting the affordability of the housing. Similarly, if an extension of a regulatory agreement is given for consideration, then the project should be eligible for the welfare exemption throughout the regulatory period. If, on the other hand, a regulatory agreement is extended without consideration, such extended period should no longer qualify the project for a welfare exemption.

FHA Insurance: Although FHA insurance is not explicitly listed in the statute as a form of government financing, if HUD did not insure private loans with FHA insurance, then these projects would not receive the private loans. Thus, it is the government assistance, i.e. HUD's insurance, which makes these project possible. Therefore, applying a simple "but for" test, we think that government insurance falls within the meaning of government financing.

C. Federal Low-Income Tax Credits

Just as projects that have received government financing and are subject to a regulatory agreement should qualify for the welfare exemption, tax credit projects

should qualify for the welfare exemption for the length of the time they are subject to the TCAC regulatory agreement. The tax credit program was established in 1986 as a mechanism for bringing private investment into affordable housing. The attraction of private investment to affordable housing is induced by the ability of private investors to receive tax credits in exchange for their investment. The tax credit system was set up to provide for investors to receive the tax credits for ten to fifteen years; however, the federal government wanted to restrict the affordability of the tax credit-subsidized housing for longer than the length of time that the investors received the tax credits. The law requires that to receive tax credits, all units in a tax credit project be restricted to low-income households at affordable rents for at least thirty years; however, TCAC has adopted a policy of regulating the occupancy and rents of tax credit projects in most cases for fifty-five years. As the tax credit allocation process is highly competitive, any project receiving tax credits restricts affordability for fifty-five years. Like other forms of government financing, the tax credits are allocated in consideration of the long-term affordability of the project. Tax credit projects should qualify for the welfare exemption throughout their regulatory period.

D. Limited-Equity Housing Cooperatives

While not all limited-equity housing cooperatives would qualify for the welfare exemption, the BOE should not categorically exclude them from qualifying for the exemption, as some limited equity housing cooperatives are substantially equivalent to rental housing. Created by California law in the late 1970s, a limited-equity housing cooperative allows residents of a housing development participation in the management of the development. The corporation owns the development, and the residents are the shareholders. As shareholders, residents are able to participate in the management of the corporation and set policies governing the management of the development. If a member of a limited-equity housing cooperative sells or transfers his or her membership interest in the cooperative, the transfer value is limited to the amount that the member paid for the interest subject only to an inflationary index linked to cost-of-living, income, or market-interest and reflecting the value of approved improvements. The nature of the limited-equity housing cooperative is best described as a hybrid, exhibiting some aspects of rental housing and some characteristics of ownership housing. While residents do have some control in the management of the housing development, they do not benefit from all of the incidents of ownership, such as equity gain and free alienability. In many ways, limited-equity housing cooperatives act like rental housing. If residents are in violation of their occupancy agreement, eviction is the appropriate legal remedy. Currently, limited-equity housing cooperatives are eligible for low-income housing tax credits, which are only available to rental units, and such projects have qualified for the welfare exemption. So long as the limited-equity housing cooperative does not allow its members to claim the homeowners' exemption, either through its organizational documents or a regulatory or contractual agreement, then the limited-equity housing cooperative should be treated as a rental project for welfare exemption purposes.

V. Proposed Rule 143: *Irrevocable Dedication Clause and Dissolution Clause Requirements for the Welfare Exemption*

We support the concept of BOE standardized language for irrevocable dedication and dissolution clauses. In drafting such language, the BOE should assume that the language is consistent with and meets the requirements of the California Secretary of State, the Franchise Tax Board, and the Internal Revenue Service.

VI. Conclusion

Thank you for your consideration of our comments on this important issue. If you wish to discuss this memorandum further, please email Amy DeVaudreuil (adevaudreuil@goldfarblipman.com), Dianne Jackson McLean (dmclean@goldfarblipman.com) or Dave Kroot (dkroot@goldfarblipman.com).

:ad

Housing Authority of The County of Merced

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EQUAL HOUSING OPPORTUNITY

NICHOLAS BENJAMIN
EXECUTIVE DIRECTOR

February 28, 2005

Mr. Dean R. Kinnee, Chief
Assessment Policy and Standards Division
State Board of Equalization
450 N. Street
P.O. Box 942879
Sacramento, Ca 994279

Dear Ladies and Gentlemen,

I am writing to express my comments and concerns relative to the proposed rules (welfare exemption) for affordable/workforce housing. Specifically I direct my comments to Mr. Kinnee's letter of January 14, 2005.

As director of the Housing Authority of the County of Merced I along with a dedicated staff work hard to preserve and develop affordable/workforce housing for our local community. We are not alone however in our effort. Local partners like the Central Valley Coalition for Affordable Housing (CVCAH) and the Affordable Housing Development Corporation (AHDC) "lock arms" with our agency towards the end of producing quality affordable/workforce housing. The need in our area is very pronounced. In our Housing Choice Voucher program (formally Section 8) we have an allocation of 2705 vouchers (which are in danger due to pending cuts at the Federal level). With those vouchers absorbed and in effect "used," there remain 4000 families on the waiting list for our programs.

Recent legislation i.e. AB 975 worked in essence to "slow" production of affordable/workforce housing or at a minimum make it much more difficult to economically produce.

In congregate (proposed rules 140,141,142 and 143) will serve as a set-back to an already "wounded" process. In particular the property tax exemption if altered could literally spell disaster for existing and future projects.

I urge you to consider most of all the low income individuals, many of whom work, that will ultimately receive the brunt of the proposed changes. Thank you for your kind consideration.

Sincerely,

Nicholas Benjamin
Executive Director

C.c. Christina Alley
Peter Herzog

Ford, Ladeena

From: Michael Stein [mstein@mmsteininc.com]
Sent: Tuesday, October 26, 2004 6:10 PM
To: Ford, Ladeena
Subject: Proposed new welfare exemption rules

Ms Ford:
I have not commented to date on the proposed rules because I have submitted detailed analyses of the legal issues presented to the BOE legal staff. Nevertheless, I do intend to comment on these rules in some depth when they are proposed. Therefore, I would like to call attention in brief to some issues that should be addressed in the rules:

Rule140:

Until late last year, it was the general understanding that the BOE position on managing general powers required that the MGP have certain powers reserved in the partnership agreement. If the regulations are going to address whether or not and in what manner these powers are being exercised, then the rules should be prospective with due regard to the MGP's role in a real estate transaction is to supervise and provide oversight which is precisely what a sole owner of such property would do in managing his real estate investments. Also, I have long felt that the required language limiting an MGP "delegation" as opposed to "authority" is unnecessary.

Rule 142:

I was somewhat dismayed not to see, among the specifically proposed definitions, a proposed definition of " enforceable and verifiable agreement" as contained in Section 214(g)(2)(A). This has become a major interpretive issue lately and the BOE, the assessors and project owners would benefit from such a definition. Also, I hope that included in the definition of "government financing" will be a determination as to which HUD, Rural Development and other agency loan, grant (including rental assistance), capital advance, subsidy, insurance and other assistance programs qualify.

Michael M. Stein, Esq.
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October 15, 2004

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email: midpen@midpen-housing.org

Ladeena Ford
State Board of Equalization
Property and Special Taxes Dept.
450 N Street
Sacramento, CA 94279

Re: SBE Letter 2004/052, Comments on Proposed Rule 140, Managing General Partner as a Qualifying Organization for the Welfare Exemption

Dear Ms. Ford:

Founded in 1970, Mid-Peninsula Housing Coalition (MPHC) is a non-profit organization that develops high quality affordable housing communities, professionally manages the properties in those communities, and provides services to residents. Throughout MPHC's 34 years of operation, the organization has witnessed significant changes in public policy and funding sources. Its mission, however, has remained the same – "to provide safe, affordable shelter of high quality to those in need of it; to help establish stability and opportunity in the lives of its residents; and to foster communities that allow individuals from all ethnic, social and economic backgrounds to live in dignity, harmony and mutual respect."

MPHC respectfully submits its comments regarding the minimum qualifications for Non-profit Managing General Partners (MGP) as follows:

The Legislature provided the benefit of the Welfare Exemption to non-profit managing general partners to provide assistance to a legitimate non-profit in furthering its charitable purpose. A non-profit MGP adds long-term value to the state because the assets will stay in the quasi-public sector long term, government funding will not be required to continually repurchase these assets from private owners. A legitimate non-profit MGP will ensure that to the greatest extent possible rents will be maintained as low as possible, that services are provided to the residents, and that the property will be managed in a way to further the organization's charitable purpose, which must include the creation of housing affordable to low income households and/or providing essential services to those households.

More specifically, in order to qualify for the Welfare Exemption, the MGP must be an eligible non-profit corporation that meets all the requirements specified in Section 214 of the State of California Revenue and Taxation Code and that MGP must have real authority, responsibility and control of the operations of the Limited Partnership, evidenced by the following:

1. Size and Capacity: The size and capacity of the MGP should be consistent with the number of limited partnerships it is involved with. The MGP must have adequate, qualified, local (within driving distance) staff either directly or through a non-profit affiliate that has the

demonstrated ability and capacity to perform the duties required of the MGP and is not stretched in its capacity.

2. Joint Ventures: In the event the non-profit is in a joint venture with a for-profit entity, the role of the non-profit MGP must be one of real authority and real responsibility for the operations of the partnership, as evidenced by a written agreement that provides the non-profit the following authority, responsibilities, and benefits: (a) approval of all major decisions including development and operating budgets, applications for financing, hiring of all key project team members, terms of all loans or grants; (b) receive a share of all fees (including developer fee, partnership management, asset management and incentive management fees) commensurate with its role and responsibilities and in no event should the share be less than 50%; (c) subject to lender and limited partner investor approval, have the authority to hire and fire the management company (unless one of the partners is managing the property directly) and be responsible for directing and monitoring the management company's performance.
3. Long-term Affordability: The Limited Partnership Agreement must provide long-term affordability through a favorable back end that will allow the MGP to have the option and right of first refusal for a period of at least one year to purchase the property from the limited partner no later than at the end of 15 years of operation for a price that does not exceed the greater of 94% of fair market value or the limited partner's share of debt plus taxes.
4. Conflict of Interest/Identity of Interest: There must be no identity of interest or affiliation between the Board of Directors of the MGP and its limited partner(s) or investors. The MGP may not receive payments for overhead or operations from its limited partner(s) or investors. There must not be any conflict of interest or business dealings between the Board of Directors of the MGP and the staff of the MGP or MGP's affiliate.
5. Finally, form BOE-267-L1, Rev 2 (12-03), section 9.A.(2) should be revised to state that, "the limited partnership agreements provides for and the organization as the managing general partner has <u>all</u> of the following specific partnership management duties:..." As currently stated, the MGP must only perform two of the nineteen duties listed. For the non-profit to have true, legitimate standing as MGP, it must retain responsibility for all of these duties. The inherent weakness in this rule disadvantages legitimate non-profit organizations that want to have real control over the operations of the limited partnership to ensure that real benefits are flowing to the residents. These non-profits, like ourselves, are often passed over by for-profit developers in favor of others who possess tax-exempt status but may be willing to accept a vastly reduced or limited role in the limited partnership.

We believe that the enforcement of these rules will avoid future abuses of the Welfare Exemption, maximize the benefit to properties that are truly managed with a view toward social objectives, affordability and services, and also maximize the amount of property tax revenue that should accrue to the State as illegitimate MGP's are denied a Welfare Exemption.

Thank you for the opportunity to comment upon the Proposed Rule 140.

Sincerely,

Fran Wagstaff
President

Mountain Vistas

675 Peppertree Lane
Redding, CA 96003
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(503) 244-7903 – Fax

February 28, 2005

Mrs. Ladeena Ford
State Board of Equalization
Property and Special Taxes Department
P.O. Box 942879
Sacramento, CA 94279-0064

RE: March 16th Meeting Regarding Welfare Exemption Rules

Dear Mrs. Ford:

My name is Kristi Boswell; I am the Manager of Mountain Vistas, a 57 unit affordable housing community located in Redding, California. Mountain Vistas is owned and operated by Southern California Presbyterian Homes (SCPH), a not-for-profit corporation that has been in business for fifty years. Mountain Vistas opened in August of 2004. Our resident population consists of seniors with their primary source of income being social security and/or supplemental security income. The need for affordable senior housing far out weighs the supply of available units as Mountain Vistas already has a waiting list of fifty applicants.

Mountain Vistas was developed using federally insured loans and state housing subsidies. The BOE's proposal to disqualify affordable housing projects financed with federally insured loans from eligibility for property tax exemptions will have a devastating impact on Mountain Vistas. Under our regulatory agreement, we cannot charge monthly rents greater than 30 percent of the resident's monthly income. Operating under a tight budget, there is little room to shift obligations around in the budget and begin paying property taxes. To do so, we would have to take money away from repairs and upkeep to the property, as well as services we have been able to offer residents to help keep them independent and in the community. If we were unable to absorb the additional costs, we would be in danger of violating our regulatory agreement and loan commitments.

If the BOE's proposal to disqualify projects financed by federally insured loans were the law in 1970, I don't think SCPH would ever have developed affordable housing communities. Affordable housing projects are fragile, risky deals because the financing is so difficult to secure. Requiring such projects to pay property taxes would most likely render the deal financially untenable.

I believe that the type of subsidy used to finance affordable housing should not be the focus of whether an exemption applies or not. The test should be whether a property is required by contracts or regulatory agreements to keep rents restricted to an affordable level. I respectfully urge the BOE to maintain the current interpretations of who qualifies for exemption from property taxes.

Thank you for the opportunity to state my views.

Sincerely,

Kristi Boswell

Kristi Boswell
Housing Manager

cc: Bill Leonard

THE NON-PROFIT HOUSING ASSOCIATION OF NORTHERN CALIFORNIA

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October 15, 2004

Ladeena Ford
State Board of Equalization
Property and Special Taxes Dept.
450 N Street
Sacramento, CA 94279

Re: SBE Letter 2004/052, Comments on Proposed Rule 140, Managing General Partner as a Qualifying Organization for the Welfare Exemption

Dear Ms. Ford:

I am writing on behalf of The Non-Profit Housing Association of Northern California (NPH) to provide our perspective on Proposed Rule 140 regarding the minimum qualifications for Non-profit Managing General Partners (MGP). The membership of NPH, currently about 500, draws together the main public, private, and non–profit partners active in the creation and support of affordable housing for low-income people in Northern California. NPH was founded by people and organizations that understood the unique value of the non-profit model of affordable housing development, management, and ownership.

We applaud the BOE's proposal to address the minimum qualifications for non-profit managing general partners. From our perspective there are two main problems to address. One is the trend of for-profit entities that have created "captive non-profits" in order to gain the tax exemption. This enables these entities to use the tax savings for private gain as opposed to advancing the affordable housing goals envisioned by the Legislature.

The second problem comes from "phony" joint ventures or partnerships in which non-profits agree to serve as managing general partners without any of the capacity or responsibility truly associated with that role. Like the use of "captive non-profits," this is primarily done to secure the tax exemption without the corresponding emphasis on providing housing affordability.

We recommend that the BOE consider the following factors in its rule-making. First the MGP should have real development capacity and experience. Second, the MGP's role in the joint venture must be substantive as measured by decision-making authority and its share of fees. Third, the rule should firmly prohibit conflicts of interests or identity of interest or affiliation between the Board of Directors of the MGP and its limited partner(s) or investors.

We look forward to working with you to address these important issues. We would welcome the opportunity to provide more input or involve more of our members in this proceeding. Please feel free to contact Doug Shoemaker at 415-989-18160 x14 or

via email at Doug@nonprofithousing.org Thank you for the opportunity to comment.

Sincerely,

Dianne J. Spaulding

Dianne J. Spaulding
Executive Director

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February 28, 2005

Mrs. Ladeena Ford
State Board of Equalization
Property and Special Taxes Department
P.O. Box 942879
Sacramento, CA 94279-0064

RE: March 16th Meeting Regarding Welfare Exemption Rules

Dear Mrs. Ford:

My name is Michael Welch and I am the Housing Administrator of Park Paseo, a 98 unit non-profit owned building located in Glendale, Los Angeles County. Built in 1985, Park Paseo provides affordable housing for low-income seniors, whose average age is 79+ years. The waiting list to become a resident at Park Paseo now exceeds over 500 as the need for elderly housing continues to increase. Some residents have a waiting period of ten years or longer.

Park Paseo was developed using federally insured loans and state housing subsidies. The BOE's proposal to disqualify affordable housing projects financed with federally insured loans from eligibility for property tax exemptions will have a devastating impact on this property. Under our regulatory agreement, we cannot charge monthly rents greater than 30 percent of the resident's monthly income. Operating under a tight budget, there is little room to shift obligations around in the budget and begin paying property taxes. To do so, we would have to take money away from repairs and upkeep to the property, as well as services we have been able to offer residents to help keep them independent and in the community. If we were unable to absorb the additional costs, we would be in danger of violating our regulatory agreements and loan commitments.

If the BOE's proposal to disqualify projects financed by federally insured loans were the law in 1970, I don't think SCPH would ever have developed affordable housing communities. Affordable housing projects are risky and fragile because the financing is so difficult to secure. Requiring such projects to pay property taxes would most likely render the deal financially untenable.

I do not believe that the type of subsidy used to finance affordable housing should be the focus of whether an exemption applies or not. The application of exemption should be whether a property is required by contracts or regulatory agreements to keep rents restricted to an affordable level. I respectfully urge the BOE to maintain the current interpretations of who qualifies for exemption from property taxes.

Thank you for the opportunity to express my viewpoint on this issue.

Sincerely,

Michael Welch
Housing Administrator

Cc: John Chiang, Fourth District County of Los Angeles
Claude Parrish, Vice-Chairman, Third District Counties of Imperial, Orange, Riverside, San Diego, a portion of Los Angeles, and a portion of San Bernardino